No. 76-672

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

BURLINGTON NORTHERN, INC., ET AL., APPELLANTS

v.

STERLING COLORADO BEEF COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS

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Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the appeal be dismissed.

STATEMENT

This is a direct appeal from that part of a final judgment of a three-judge district court (J.S. App. 1a-7a) which set aside an order of the Interstate Commerce Commission insofar as it denied Sterling Colorado Beef Company's complaint for reparations against the appellant railroads.[1] The reparations complaint had alleged that rail rates on certain trailer-on-flatcar (TOFC) shipments

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[1]The district court judgment also affirmed a different Commission order with respect to a new schedule of trailer-on-flatcar rates from the West to the East. That portion of the district court judgment is also before this Court on appeal in *Sterling Colorado Beef Company* v. *United States, et al.*, No. 76-757.

of fresh meat and meat byproducts from Sterling's Colorado plant to Chicago and points in various eastern States were unjust and unreasonable, in violation of 49 U.S.C. 1(5), and were unduly preferential to Sterling's competitiors at Greeley, Denver, and Pueblo, Colorado, in violation of 49 U.S.C. 3(1). An administrative law judge found that the Sterling to Chicago rates were unlawful, in violation of 49 U.S.C. 1(5) and 3(1), but that the record contained probative evidence that the rates east of Chicago were not unlawful (J.S. App. 18a-33a). A Commission review board affirmed with only minor modifications.

On reconsideration, the Commission upheld the earlier reports and awarded reparations with respect to the Sterling to Chicago charges (J.S. App. 8a-17a). The Commission specifically limited its opinion to the reasonableness of the rates west of Chicago, and affirmed prior findings that Sterling had failed to introduce probative evidence on the lawfulness of the rates to points east of Chicago (J.S. App. 15a).

Sterling then filed in the United States District Court for the District of Colorado an action to set aside the Commission's order. It invoked the court's jurisdiction under 28 U.S.C. (Supp. V) 1336(a), which provides that the district courts shall have jurisdiction of any civil action "to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures." Sterling also filed in the same court an action to set aside an order of the Commission entered in a different proceeding (hereinafter the "rate case") which also involved eastbound TOFC rates (see note 1, *supra*). A three-judge court was convened in the rate case pursuant to 28 U.S.C. (1970 ed.) 2325, and the present reparation case was consolidated with the rate case for hearing and disposition.

The three-judge court reversed the Commission's decision in the reparations case and remanded the case for reconsideration of the reparations issue (J.S. App. 1a-7a). Although the Commission had denied reparations for shipments terminating east of Chicago on the ground that Sterling failed to produce evidence concerning the rates for the east-of-Chicago segment of such transportation, the court found that Sterling "did sustain economic injury on all of its shipments to the east, regardless of the points of termination" (J.S. App. 4a). The district court also ruled that the Commission had unreasonably ignored the geographical facts of the case and failed to take into account the competitive relationships of the shippers (J.S. App. 5a).

ARGUMENT

This Court lacks jurisdiction of this appeal. Under 28 U.S.C. 1253, a party may appeal to this Court from an order granting or denying an injunction in a civil action "required by any Act of Congress to be heard and determined by a district court of three judges." Although this case was heard and determined by a district court of three judges, no Act of Congress *required* a three-judge district court.

This reparations case involved an effort to set aside an order of the Commission "for the payment of money" (28 U.S.C. (Supp. V) 1336(a)). *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 203, 205. The former provisions of Title 28 that required the convening of a three-judge court in actions to set aside orders of the Interstate Commerce Commission, 28 U.S.C. (1970 ed.) 2321-2325, were expressly inapplicable to orders "for the payment of money." 28 U.S.C. (1970 ed.) 2321.[2]

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[2]Under Pub. L. 93-584, 88 Stat. 1917, 1918, certain actions filed on or after March 1, 1975, to review orders of the Interstate Commerce Commission must be brought in the courts of appeals. 28 U.S.C.

Thus, as this Court held in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 441, "judicial review of an order denying reparations does not require a three-judge court." In *Perez* v. *Ledesma*, 401 U.S. 82, 87, this Court held that "[e]ven where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them" (footnote omitted). It follows that an appeal from the district court's judgment in this case lies exclusively in the court of appeals, not in this Court. See *Ringsby Truck Lines, Inc.* v. *United States*, 490 F. 2d 620 (C.A. 10), certiorari denied *sub nom. Ringsby Truck Lines, Inc.* v. *National Small Shipments Traffic Conference, Inc.*, 419 U.S. 833; cf. *Moody* v. *Flowers*, 387 U.S. 97.

Since the time to appeal to the court of appeals has expired and appellants have not, to our knowledge, filed a protective notice of appeal to the court of appeals, this Court may wish to remand the case to the district court "so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals." *Pennsylvania Public Utility Commission* v. *Pennsylvania R. Co.*, 382 U.S. 281, 282. See *Moody* v. *Flowers, supra*, 387 U.S. at 104; *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens*, 397 U.S. 820.

(Supp. V) 2321, 2342. Review of orders "for the payment of money," however, remains within the exclusive jurisdiction of the district courts. 28 U.S.C. (Supp. V) 1336(a). Sterling Colorado Beef Company's district court complaint was filed before March 1, 1975.

CONCLUSION

The appeal should be dismissed or, alternatively, the judgment should be vacated and the case remanded to the district court for the entry of a fresh decree.

Respectfully submitted.

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